

STATE OF NORTH CAROLINA

WAKE COUNTY



BEFORE THE

DISCIPLINARY HEARING COMMISSION

OF THE

NORTH CAROLINA STATE BAR

11 DHC 9

THE NORTH CAROLINA STATE BAR,

Plaintiff

v.

MOTIONS, ANSWER,  
AFFIRMATIVE DEFENSES

CLYDE GARY TRIGGS, Attorney,

Defendant

**NOW COMES** the Defendant answering moving and by way of Affirmative Defenses responding to the Complaint previously filed as follows:

**I.  
MOTION TO STRIKE**

The Defendant respectfully moves pursuant to Rule 12(f) to strike paragraph 5 and 6 of the complaint in support of motion the Defendant alleges and says that the statements contained therein are prejudicial. That any determination of the merits of the claims asserted against the Defendant should be determined without prior knowledge of any previous disciplinary action.

**II.  
MOTION TO DISMISS  
12(b)(6)**

The Defendant respectfully says and alleges that the Plaintiff's Complaint as filed fails to allege sufficient facts or state a claim upon which relief can be granted and therefore, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the Motion should be dismissed.

**III.  
MOTION TO DISMISS**

With regard to the fourth claim for relief the Defendant asserts the statute of limitations as a complete defense alleging that if any misconduct occurred, which is specifically denied. The conduct occurred more than six (6) years prior to the filing of the grievance.

**IV.  
FIRST AFFIRMATIVE DEFENSE  
(Estoppel)**

The Defendant respectfully asserts the Affirmative Defense of Estoppel in bar of Plaintiff's Complaint.

**V.  
SECOND AFFIRMATIVE DEFENSE  
(Unclean Hands)**

The Defendant asserts the affirmative defense of unclean hands in bar of Plaintiff's Complaint.

**VI.  
THIRD AFFIRMATIVE DEFENSE  
(Excusable Neglect)**

The Defendant respectfully asserts as a affirmative defense that that any acts or omissions were neither intentional nor the result of anything other than a mistake or inadvertence amounting to excusable neglect.

**VII.  
ANSWER**

Without waiving the foregoing motions and affirmative defenses by way of answer the Defendant says and alleges as follows:

1. Paragraphs 1 through 6 are admitted.
2. Paragraphs 7 through 9 are admitted.
3. Paragraph 10 is admitted to the extent that a letter from the mediator was sent to the Defendant.
4. Paragraph 11 is admitted.

5. Paragraph 12 is admitted.
6. Paragraph 13 is denied to the extent that no response was made; however, it is admitted that the claim was not settled or mediated.
7. Paragraph 14 is admitted. By way of affirmative defense, it is specifically alleged that at all relevant times the Defendant had a system established within the office consistent with those of other law firms within the area by which files were assigned to a paralegal to ensure that the statute of limitations was marked and the files were handled in a timely and routine fashion. At all relevant times the Defendant had every reason to believe that the paralegal to which this file was entrusted had the ability and that all aspects of the case were being handled in a timely fashion. The Defendant made notations on the documents as they passed his desk to ensure that this was done; however, contrary to the office policies and the specific statements of the office staff notations were not made the action was not filed within the time prescribed all of which are asserted in bar of the assertion of misconduct on the part of the Defendant.
8. By way of further affirmative defense the response previously filed to the grievance in this matter dated October 12, 2010 together with the attachments is incorporated herein by reference as if fully set forth herein.
9. Paragraphs 15 and 16 are denied.
10. It is respectfully contended that the actions on the part of the Defendant in the handling of this matter did not violate the Rules of Professional Conduct.
11. Paragraph 17 is admitted to the extent previously admitted and denied to the extent previously denied. All affirmative defenses and motions are reasserted by reference.
12. Paragraphs 18 through 21 are admitted.
13. Paragraph 22 is admitted to the extent William M. Oates did not appear and sign the document on the date the verification was executed. By way of affirmative defense the response previously submitted to the bar together with the attached affidavits is incorporated herein by reference as if fully set forth herein.

14. Paragraph 23 is admitted to the extent that the paralegal who notarized the affidavit worked under the supervision of the Defendant; however, the Defendant had no knowledge at the time the document was changed about the change as set forth in the affidavit of the paralegal. The previous response filed in this matter with the attached affidavits are incorporated herein by reference as an affirmative defense.
15. Paragraph 24 is admitted.
16. Paragraph 25 is admitted.
17. Paragraph 26 is denied. By way of affirmative defense it is alleged that Mr. Jones was told the wrong affidavit had been sent as stated in the Defendant's response.
18. Paragraph 27 is denied. By way of affirmative defense the affidavit of Greg Oates and Donna Smith together with the prior response filed with the bar are incorporated herein by reference as if fully set forth herein. The Defendant had no knowledge that the wrong affidavit had been sent nor did the Defendant make a false statement of material fact to the tribunal or the Bar as he is falsely accused of doing.
19. It is respectfully contended that the actions on the part of the Defendant in the handling of this matter did not violate the Rules of Professional Conduct.
20. Paragraph 28 is admitted to the extent previously and denied to the extent previously denied. Affirmative defenses and motions are reasserted herein by reference.
21. Paragraphs 29 through 38 are admitted.
22. Paragraph 39 is admitted to the extent that the matter was scheduled for January 7, 2008; however, the Defendant was not able to appear as a result of being involved in a murder case in Mitchell County, at fact which was communicated to the Court by fax transmission copies of which were previously submitted. Upon information and belief, according to office policy Ms. Sparks was also advised of the conflict. The remaining portions are denied for lack of sufficient information.
23. Paragraph 40 is admitted.

24. Paragraph 41 is admitted; however, by way of affirmative defense it is alleged that the primary reason for the inability to obtain service on Mr. Williams was the failure on the part of Mrs. Sparks, to provide an address or agree to pay the costs of service by publication.
25. Paragraph 42 is admitted.
26. Paragraph 43 is admitted to the extent that the Defendant received a letter dated April 20, 2009 from Mrs. Sparks terminating the relationship seeking a refund of her entire retainer and her papers. By way affirmative defense it is asserted that at all relevant times the Defendants file was available for pick up if she chose to do so; however, with regard to the retainer the sums paid had been used as fee pursuant to the fee contract.
27. Paragraph 44 is denied. By way of further affirmative defense it is alleged that on May 8, 2009 the Defendant received a notification of mandatory Fee Dispute Resolution to which the Defendant properly responded on May 28, 2009. The response sent to Luella C. Crane, Director of the North Carolina State Bar Fee Dispute Resolution Program is incorporated herein by reference as if fully set forth herein together with all of the attachments. By way of further affirmative defense the response filed by the Defendant to the grievance together with all attachments are incorporated herein by reference as if fully set forth herein. It is respectfully contended that the Defendant did in fact provide Mrs Sparks file materials as requested and thus did not violate Rule 1.16(d) nor did the actions of the Defendant and his staff violate Rule 1.3 as asserted.
28. It is respectfully contended that the actions on the part of the Defendant in the handling of this matter did not violate the Rules of Professional Conduct.
29. Paragraphs 1 through 45 are admitted as previously admitted and denied as previously denied. All affirmative defenses and motions are reasserted herein by reference as if fully set forth herein.
30. Paragraph 46 through 48 are admitted.
31. Paragraph 49 is denied.
32. Paragraphs 50 and 51 are admitted.

33. Paragraph 52 is denied for lack of sufficient information.
34. Paragraph 53 is denied for lack of sufficient information.
35. Paragraph 54 is denied.
36. Paragraph 55 is admitted to the extent that the Defendant received a letter in February of 2010, except as admitted all other portions are denied.
37. Paragraph 56 is denied. By way of affirmative defense, it is alleged that even Mr. Dodson acknowledges speaking with the staff from the Defendant's office in his filing.
38. Paragraph 57 is admitted.
39. Paragraph 58 is admitted to the extent that the Defendant did contact Mr. Dodson after receiving a letter of notice from the State Bar and provided a copy of the letter sent in his response to the grievance. By way of affirmative defense it is alleged that the alleged misconduct occurred outside of the statute of limitations which is specifically pled in bar to this action. The response to the grievance previously filed in this matter together with the documents attached are incorporated herein by reference..
40. It is respectfully alleged that the action on the part of the Defendant with regard to this matter did not violate the Rule of Professional Conduct.
41. Paragraph 59 is admitted to the extent previously admitted and denied to the extent previously denied. All affirmative defenses and previous motions are incorporated herein by reference as if fully set forth herein.
42. Paragraphs 60 through 70 are admitted.
43. Paragraph 71 is admitted; however, by way of affirmative defense it is alleged that the reason for not filing an action was as a result of an ongoing negotiations and the honest belief that the matter could be settled. By way of further affirmative defense the answer filed by the Defendant to the grievance together with all attachments are incorporated herein by reference as if fully set forth herein.
44. Paragraph 72 is admitted.

45. Paragraph 73 is denied. It is respectfully asserted that the Schoenens did receive updates in 2005 and 2006. It is admitted that an appointment was scheduled. Excepted as admitted all other allegations are denied.
46. Paragraph 74 through 77 are denied.
47. Paragraph 78 is admitted to the extent that conversations took place with Ms. Schoenen during 2007 at which time the situation was discussed. At all relevant times the Defendant gave accurate information to Schoenen concerning where the case stood and what was being done or what could be done to correct the problems that existed. Except as admitted all other portions are denied.
48. Paragraph 79 is admitted to the extent that several appointments were changed as a result of Court conflicts. Except as admitted all other portions are denied.
49. Paragraph 80 is admitted to the extent that a conversation took place with the Schoenens in which the Defendant explained to them exactly what had occurred and advised them since the statute of limitations was an affirmative defense it was the Defendant's intention to file an action in the Burke County Superior Court, seek to obtain service thus forcing the Defendant to assert the statute of limitations. If the Statute of limitations was not asserted or if service was obtained and a default judgment entered it was the belief of the Defendant that the Schoenens would be placed in a position where negotiations could once again take place.
50. Paragraph 81 is admitted to the extent that a complaint was filed October 18, 2007 which is outside the three (3) year statute of limitations as explained to the Schoenens by the Defendant.
51. Paragraph 82 is denied.
52. Paragraph 83 is denied for lack of sufficient information.
53. Paragraph 84 is admitted to the extent negations a meeting occurred on March 12, 2008. Except as admitted all other portions are denied.
54. Paragraph 85 is admitted that the Defendant discussed various methods of service ; however, no payment as ever made by Ms. Schoenen for publication costs.

55. Paragraph 86 is admitted to the extent that the Complaint was not served upon Mr. Wynkoop.
56. Paragraphs 87 and 88 are denied for lack of sufficient information.
57. Paragraph 89 is admitted to the extent that in August 2009, a facsimile was sent to the Defendant by Ms. Schoenen, the remaining portions are denied.
58. Paragraph 90 is admitted to the extent that after receiving the facsimile in August the Defendant contacted the Schoenens and at that time asked that an appointment be scheduled so that they could discuss various alternatives to getting the matter resolved. The remaining portions are denied.
59. Paragraph 91 is denied.
60. Paragraph 92 is denied.
61. Paragraph 93 is admitted to the extent that several appointments were made which had to be cancelled as a result of Court conflicts except as expressly admitted all other portions are denied.
62. By way of affirmative defense the response filed by the Defendant to the grievance is asserted herein by reference as if fully set forth herein.
63. It is respectfully contended that the actions on the part of the Defendant did not violate the Rules of Professional conduct.
64. Paragraph 94 is admitted to the extent previously admitted and denied to the extent previously denied. All affirmative defenses and motions are reasserted herein by reference.
65. Paragraphs 96 through 101 are admitted.
66. Paragraph 102 is admitted to the extent that at the time the voluntary dismissal was signed when the Defendant was not present; however, the dismissal was self explanatory. The issues regarding the dismissal were later brought to the attention of the Greers as outlined in the previous response filed by the Defendant which is reasserted herein by reference.
67. Paragraphs 103 and 104 are denied.



68. Paragraphs 105 and 106 are admitted.
69. Paragraph 107 is admitted to the extent that an offer was communicated which contained language that the offer would expire if not accepted by September 26, 2005. The offer was communicated to the Greers who expressly rejected the offer.
70. Paragraph 108 is admitted.
71. Paragraph 109 is denied.
72. Paragraph 110 is denied for lack of sufficient information.
73. Paragraph 111 is admitted to the extent that the Defendant advised the Greers that if the matter could not be settled efforts would be made to get the matter re-calendared.
74. Paragraphs 112 and 113 are admitted.
75. The response previously filed in this action together with all attachments is reasserted herein by reference as if fully set forth herein.
76. The Defendant respectfully contends that the actions of the Defendant and his staff did not violate the Rules of Professional Conduct.
77. Paragraph 114 is admitted to the extent previously admitted and denied to the extent previously denied. All affirmative defenses and motions are reasserted herein by reference.
78. Paragraph 115 is admitted.
79. Paragraph 116 is admitted to the extent that on June 15, 2006 Mr. Page and Ms Hutto paid Two Thousand Five Hundred Dollars (\$2,500.00) as a retainer for the Defendant to review and determine whether or not post conviction relief was appropriate in this matter pursuant to N.C.G.S. § 15A-1415.
80. Paragraph 117 is admitted.
81. Paragraph 118 is admitted to the extent that a letter was sent on January 27, 2007 the contents of which are self explanatory.


82. Paragraph 119 is admitted to the extent that Mr. Page sent various notes or letters to the Defendant during the course of the representation except as expressly admitted the remaining portions are denied.
83. Paragraph 120 is admitted to the extent that a letter was sent on November 21, 2007 the contents of which are self explanatory.
84. Paragraph 121 is admitted to the extent that a letter dated September 17, 2008 was received by the Defendant in which Mr. Page complained.
85. It is admitted that on September 23, the Defendant sent a letter to Mr. Page the contents of which are self explanatory.
86. Paragraph 123 is admitted to the extent that on November 18, 2008 a card was received terminating the attorney client relationship which was part of an ongoing exchange of letters in which Page made conflicting statements about whether he did or did not want Mr. Triggs to continue to represent him.
87. Paragraph 124 is admitted.
88. Paragraph 125 and 126 are denied.
89. Paragraph 127 is admitted.
90. By way of affirmative defense the response filed on October 22, 2009 to the grievance together with the attachments is incorporated herein by reference as fully set forth herein.
91. That in addition to the foregoing the Defendant has been contacted by Mr. Page and has since that time contacted an additional attorney involved in Mr. Page's case to again attempt to assist Mr. Page in obtaining relief.
92. It is respectfully contended that the actions on the part of the Defendant in the handling of this matter did not violate the Rules of Professional Conduct.

**WHEREFORE** the Defendant respectfully prays the Court as follows:

1. That the actions as filed be dismissed.

2. That the motions asserted by the Defendant be allowed.
3. That the affirmative defenses asserted by the Defendant be allowed and the actions dismissed.
4. That no disciplinary action be taken against the Defendant.
5. That no administrative fees or costs be taxed against the Defendant.
6. For such other and further relief and the Court shall deem just and proper.

THIS the 11th day of May 2011.

  
C. Gary Triggs  
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Hildebran North Carolina 28637  
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## CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that a copy of the foregoing *Motions, Answer and Affirmative Defense* was duly served upon opposing counsel this day in the following manner:

\_\_\_\_\_ By personally hand delivering a copy of the same to him or to one of his employees at his office; or

\_\_\_\_\_ By facsimile transmission to:

  X   By depositing a copy of the same in the United States mail, first class, postage prepaid, addressed to him/her as follows:

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Attorney for Plaintiff

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Office of the Secretary of the North Carolina State Bar  
208 Fayetteville Street  
Raleigh, NC 27601

This the 14<sup>th</sup> day of May, 2011.

**C. GARY TRIGGS, P.A.**

By: \_\_\_\_\_

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